

COMPLIANCE BOARD OPINION No. 96-03

April 9, 1996

Mr. Robert Guy Matthews

The Open Meetings Compliance Board has considered your complaint of January 31, 1996, in which you alleged that the Baltimore City Council has violated the Open Meetings Act by excluding members of the press and public from the “Monday luncheon meetings” of the Baltimore City Council. In a timely response on behalf of the Council, William R. Phelan, Jr., Esquire, of the City Solicitor’s Office, acknowledges that the luncheons are not open to the public but contends that the Open Meetings Act does not require them to be open.

The Open Meetings Compliance Board has concluded that, although the holding of closed luncheon discussions does not necessarily violate the Act, *all* aspects of the legislative process must be avoided if the press and public are to be barred. In particular, the Act does not permit the formulation of the Council’s agenda, or any discussion of an agenda item, at a closed luncheon meeting. Past agenda-related activities violated the Act.

I

Background

With some exceptions, the Open Meetings Act requires an open session when a quorum of a public body “meets” that is, convenes “for the consideration or transaction of public business.” §§10-502(g) and 10-505 of the State Government Article, Maryland Code. Conversely, when a quorum of a public body convenes for some purpose other than “the consideration or transaction of public business,” there is no “meeting” and the Act does not apply. In particular, the Act does not apply to a “chance encounter, *social gathering*, or other occasion that is not intended to circumvent this subtitle.” §10-503(a)(2).

Yet, a public body’s informal, closed gathering may not be used as a “cloak for the conduct of public business.” Compliance Board Opinion 94-6, at 4 (August 16, 1994). In that opinion, we deemed it “an impermissible circumvention of the Act for a public body to use such an informal gathering as a device to script discussion at the following meeting, to set the

agenda for discussion, or to discuss the merits of any matter that is to be dealt with at the meeting proper.” *Id.*

Within this framework, we consider what we are told occurs at the City Council luncheons. Mr. Phelan describes “two distinct types of luncheons involved: those hosted by the President of the City Council and those hosted by the Mayor.” The host alternates from one week to the next. We shall consider each type of luncheon separately.

II

Council President’s Luncheons

Mr. Phelan has provided an account of the matters that ordinarily arise at the President’s luncheons. We shall consider the Open Meetings Act status of each. Mr. Phelan points out that, on occasion, no quorum of Council members attends the President’s luncheon. If no quorum is present, the Act does not apply.

A. Administrative Matters

According to Mr. Phelan, one of the main purposes of the President’s luncheons is to afford “an opportunity for the President to address administrative matters relating to the internal operation of the Council. For example, the President may review such matters as the allocation of parking spaces, procurement of office furniture, installation of Council telephone lines, and other matters involving the mechanics of running the Council’s offices and spending its operational monies.”

In our opinion, discussion of these administrative details, although a matter of “public business,” nevertheless is not subject to the Open Meetings Act. The Act does not apply to a public body when it is carrying out “an executive function,” §10-503(a)(1)(i); that term, defined in §10-502(d), refers to “the application of an already-established law or policy.” Office of the Attorney General, *Open Meetings Act Manual* 10 (2d ed. 1995). The administrative matters described above are an implementation of the law establishing the Council, its budget, and the role of its presiding officer.

B. Review of Draft Agenda

Mr. Phelan reports that, “[d]uring the course of the luncheon, the President distributes to those present a draft of the agenda for the next

legislative meeting. Council members may then note and correct errors in the agenda, such as adding their names as co-sponsors of bills or removing an item which should not be included.” The City Council likens this discussion of the draft agenda to the housekeeping matters discussed in Part IIA above and suggests that this discussion is also within the “executive function” exclusion from the Act.

The Compliance Board disagrees. An activity cannot fall within the “executive function” exclusion if the activity is encompassed by the term “legislative function.” A “legislative function,” to which the Act surely applies, means “the process or act of ... approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy.” §10-502(f)(1). The Act’s reference to “process” means “that the Act applies, not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well as to all deliberations which precede the actual legislative act or decision, unless authorized by [the Act] to be closed to the public.” *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980).

In our opinion, the legislative process begins with a decision to put a matter on the agenda (and could end with a sponsor’s decision to pull an item). Even an action as straightforward as adding the name of a new co-sponsor has political and policy implications that are part of the legislative process.

The Compliance Board recognizes that these are matters within the province of individual Council members and are not themselves the subject of group decision. However, when a quorum of the Council has been convened, even actions or comments solely within an individual member’s discretion – for example, the making of a motion – are part of the conduct of public business that constitutes a meeting.

The City Council’s response points out that the action related to the agenda “could be done by mail, telephone or personal contact with eighteen individuals” This point is immaterial. Much public business could conceivably be done outside of a meeting and, if it is, the Open Meetings Act is inapplicable. The Act might nevertheless apply – and, here, does apply – to that same action when performed at a meeting.

C. Presentations

A common occurrence at the President’s luncheons, according to Mr. Phelan, “is a presentation of a private or public organization, giving an overview of its activities. These presentations have no connection to any particular legislative business. “The Compliance Board agrees with a line of demarcation drawn by the Attorney General: If a presentation to the City Council merely concerns a topic of

general interest, that presentation “would not involve the conduct of public business, for the [presentation] would be too remote from any actual decision-making process.” 80 *Opinions of the Attorney General* ____ (1995) [Opinion No. 95-058 at 3 (December 20, 1995)]. On the other hand, if a presentation were “focused on a topic that was then before the [City Council] in some specific way, the session might well be considered the conduct of public business ...” and therefore subject to the Act. *Id.* We would add that if a broad presentation were linked, by comments or questions, to items before the Council, the Act would likewise become applicable.

Therefore, if the Council intends to continue closed-door presentations, the President must ensure that any discussion remains general. We are not ignoring the natural, inevitable, and even laudable tendency of public officials to translate generalities into specific policy choices; we are merely pointing out that such a translation must occur in public, not behind closed doors.

D. Explanation of Sponsor’s Intent

Mr. Phelan acknowledges that, “[o]n infrequent occasions, a Council member may spontaneously explain the intent behind a bill on the draft agenda. This has only occurred once during the tenure of the current President. However, debates, votes, and straw votes are prohibited at the luncheons.”

In our opinion, such comments are manifestly a part of the process by which legislation is considered. When a quorum of the Council is present to hear a sponsor’s explanation, the Council is itself engaged in a “legislative function,” even if debate about and voting on the bill do not then occur. A sponsor’s explanation is the starting point of debate on a piece of legislation.

The absence of colloquy or a vote is not determinative. In a recent opinion, we concluded that a city council’s decision in a closed meeting to have legislation drafted, made without debate or a vote, violated the Open Meetings Act. Compliance Board Opinion 95-11 (December 18, 1995). We reach a similar conclusion here. If the City Council wishes to entertain sponsor explanations of agenda items, it must open that portion of its luncheon meetings. In order to continue to have these meetings be closed, the President must rule out of order any member’s attempt to address an item of pending or intended future business.

III

Mayor’s Luncheons

As Mr. Phalen points out, the bi-weekly luncheons in the Mayor’s office are properly to be viewed as a gathering organized by the Mayor, to which City Council members are invitees. And, of course, the Open Meetings Act does not apply to the Mayor and his meetings. *See* §10-502(h)(3)(i).

Nor, as we have concluded several times, does the mere presence of a quorum of a public body at a single official's meeting by itself make the Act applicable. Compliance Board Opinions 95-4 (August 14, 1995), 94-9 (November 15, 1994), and 92-2 (October 23, 1992). *See Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157, *cert. denied*, 334 Md. 631 (1994).

"To be sure, a public body may not escape its obligations under the Act, even in some other entity's forum, if the public body *itself* engages in the consideration or transaction of public business." Compliance Board Opinion 94-9, at 2 (citations and internal quotation marks omitted). If, at the Mayor's luncheon, a quorum of the City Council functioned as a quorum by engaging in any aspect of the legislative process, including a briefing on or discussion of any matter pending before the Council, the Act will have been violated. However, if any briefings are general in nature and unrelated to specific matters of Council business, and if Council members adhere to the restrictions discussed in Part II above, the Act will not be violated by a closed luncheon.

IV

Conclusion

In a recent opinion, we observed as follows: "A quorum of a public body may eat lunch together in private, but they must refrain from conducting public business during that time." Compliance Board Opinion 95-6, at 2 (October 18, 1995). That succinct ground rule applies here. Social discourse and general informational briefings may occur during such private luncheons. However, no aspect of the legislative process – including formulation of a legislative agenda or discussion of an agenda item – may occur at a private luncheon. To the extent that agenda-related discussions occurred in the past, the City Council violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

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